Supreme Court of the United States

OCTOBER TERM, 1922.

No. 404.

THOMAS D. McCARTHY, UNITED STATES MARSHAL FOR THE SOUTHERN DISTRICT OF NEW YORK,

Appellant,

vs.

JULES W. ARNDSTEIN.

Respondent.

BRIEF ON BEHALF OF APPELLANT.

JAMES M. BECK,
Solicitor-General,
for Appellant.

SAUL S. MYERS,
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PRESS OF FREMONT PAYNE, INC., 80 Washington St., New York City.

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FIRST POINT.—Arndstein did not appeal from the order adjudging him in contempt, but attacked it collaterally by writ of *habeas corpus*. The improper refusal to answer a single question—improper because the claim that the answer would incriminate the witness was obviously made in bad faith or because no possible answer to the question could have had that effect, or because the privilege against self-incrimination had been waived as to that particular topic—is sufficient to support the contempt order against attack by *habeas corpus*. The petitioner had the burden of showing that his refusals to answer were justified in every instance 10

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SECOND POINT.—The issue of waiver on the present record which includes the oral testimony of Arndstein, is wholly different from the issue in *Arndstein* vs. *McCarthy* (254 U. S., 71), a case decided upon the schedules "standing alone." The settled principles of the subject are that a witness who does testify concerning matters that might incriminate him, waives his privilege to refuse further answers; and this is true alike where the testimony takes the form of "denials" and where it takes the form of "partial disclosures" 13

THIRD POINT.—By the testimony which the bankrupt voluntarily gave on his examination concerning his property and assets, his names and his travels, he waived the right to assert his constitutional privilege against further questions upon the same subjects, or, indeed, upon the "criminating fact as a whole" 30

FOURTH POINT.—The court, not the witness, is the judge whether a possibility of incrimination exists. It is plain that some of the answers Arndstein refused to give could not have incriminated him. This is apparent in some instances from the character of the questions themselves; in some instances from the answers given to other questions 41

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FIFTH POINT.—The record shows that Arndstein's claims—and particularly his final claims—of privilege were not made in good faith. This appears plainly by comparison of his apparent willingness to testify on the first day of the hearing with his positive refusal to give any testimony whatever on the last day; by his gradual yielding to counsel's instructions to claim privilege against many questions which at first he was willing to answer; and by answers and admissions contained in his testimony which plainly contradict his final claim of privilege to the same or similar questions 52

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